

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW MEXICO

SAMMY LEROY MCMURRAY,

Plaintiff,

vs.

No. CV 15-0723 MV/WPL

JERRY GALLOWAY,

Defendant.

MEMORANDUM OPINION AND ORDER OF DISMISSAL

THIS MATTER is before the Court *sua sponte* pursuant to Fed.R.Civ.P. 41(b) and 28 U.S.C. 1915(e)(2) and (g), on Plaintiff Sammy Leroy McMurray's amended Civil Rights Complaint Pursuant to 28 USC 1983 (sic) filed November 12, 2015 (Doc. 10) ("Amended Complaint"). Also before the Court is McMurray's Prisoner's Motion and Affidavit for Leave to Proceed Pursuant to 28 U.S.C. § 1915 filed November 16, 2015. (Doc. 11) ("Motion for Leave to Proceed"). For the reasons set out below, the Court will dismiss the Amended Complaint, deny the Motion for Leave to Proceed, and dismiss this action.

McMurray has brought numerous civil actions in this Court, all of which were filed while McMurray was incarcerated, and most of which were dismissed as frivolous or for failure to state a claim. McMurray has had three strikes imposed against him and may no longer proceed *in forma pauperis* under the provisions of 28 U.S.C. § 1915(g). (Doc. 3). McMurray is also under filing restrictions that enjoin him from filing further litigation in this Court unless either a licensed attorney admitted to practice before the Court signs the pleading or McMurray is

granted prior permission to proceed pro se by the Court. See, *McMurray v. McCelmoore*, No. CV 10-0389 JH/GBW, Doc. 12 and 18).

McMurray filed his original Civil Rights Complaint Pursuant to 42 U.S.C. 1983 and sought to proceed under 28 U.S.C. § 1915 without prepayment of fees and costs on August 17, 2015. (Doc. 1, 2). By Memorandum Opinion and Order entered September 3, 2015, the Court denied leave to proceed *in forma pauperis* and dismissed the Civil Rights Complaint because it was filed in violation of the filing restrictions previously entered against him. (Doc. 3). On October 29, 2015, McMurray appealed to the United States Court of Appeals for the Tenth Circuit and also sought leave to proceed *in forma pauperis* on appeal. (Doc. 6, 7). The appeal was dismissed for want of prosecution on November 30, 2015. (Doc. 12 and 12-1). This Court denied the Motion for leave to proceed *in forma pauperis* on appeal on January 27, 2016. (Doc. 13).

In November 2015, while his appeal was pending before the Tenth Circuit Court of Appeals, McMurray filed the Amended Complaint and the Motion for Leave to Proceed. (Doc. 10, 11). Due to the pendency of the appeal, the Court lacked jurisdiction over this proceeding at the time the Amended Complaint and Motion for Leave to Proceed were filed. *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58, 103 S.Ct. 400, 74 L.Ed.2d 225 (1982) (holding that the filing of a notice of appeal generally divests the district court of jurisdiction over aspects of the case involved in the appeal). McMurray's Amended Complaint and Motion for Leave to Proceed were also filed in violation of the prior filing restrictions and the provisions of 28 U.S.C. § 1915(g). (Doc. 3). The Motion for Leave to Proceed does not allege that McMurray is in imminent danger of serious physical injury. *Pigg v. FBI*, 106 F.3d 1497 (10<sup>th</sup> Cir. 1997).

The Court may dismiss an action under Fed.R.Civ.P. 41(b) for failure to prosecute, to comply with the rules of civil procedure, or to comply with court orders. *See Olsen v. Mapes*, 333 F.3d 1199, 1204, n. 3 (10<sup>th</sup> Cir. 2003) (noting that a district court may dismiss, *sua sponte* when one of the rule 41(b) conditions is met). The Court will dismiss the Amended Complaint and deny the Motion for Leave to Proceed, will dismiss this civil action based on McMurray's violation of prior Court Orders, and will enter final judgment.

IT IS ORDERED:

- (1) McMurray's Amended Complaint (Doc. 10) is DISMISSED, his Motion for Leave to Proceed (Doc. 11) is DENIED and this civil action is DISMISSED pursuant to Fed.R.Civ.P. 41(b);
- (2) McMurray is prohibited from filing any pleading with this Court unless it is signed by a licensed attorney admitted to practice before this Court or McMurray has obtained permission to proceed pro se from the Court prior to filing the pleading; and
- (3) Under the three-strikes provision of 28 U.S.C. § 1915(g), McMurray may not bring any civil action or appeal any judgment without prepayment of fees and costs unless he is under imminent danger of serious physical injury.



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UNITED STATES DISTRICT JUDGE